Index.

CITATIONS.

FEDERAL STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

SHEPARD NILES CRANE AND HOIST CORPORATION,
Petitioner,

v.

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division, United States Department of Labor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To: The Honorable The Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above case on December 1, 1948.

Opinions Below.

The opinion of the District Court (R. 143) is reported 72 F. Supp. 239. The opinion of the Circuit Court of Appeals (R. 199-206) is reported in 171 F. (2d) 69.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 1, 1948 (R. 207). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

Whether bonus gratuities, not related to any production factor, such as earnings, efficiency or attendance, given employees retrospectively about every three months in the discretion of and by the separate action of employer's board of directors, in flat sums in varying amounts, without any announcement or promise to employees of payment or continuance of payment and after employees had received regular weekly straight hourly earnings plus incentive earnings plus statutory overtime thereon, are part of an employee's "regular rate at which he is employed" within the meaning of Section 7 (a) of the Fair Labor Standards Act? and,

Whether the mere expectation and reliance of some employees that the employer will pay more bonuses, based on the fact that employer paid bonus gratuities at recurring intervals, over a period of years, makes such bonuses part of the regular rate at which an employee is employed within the meaning of Section 7 (a) of the Fair Labor Standards Act?

Statute Invoked.

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C., sec. 201) are as follows:

Sec. 7 (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

For a work week longer than forty hours after the expiration of the second year from * * * (the effective) date (of this section),

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Statement.

Petitioner manufactures cranes and hoists and employs about four hundred people at Montour Falls, New York. Petitioner is engaged in interstate commerce.

On a motion for summary judgment, the District Court found for petitioner, the Court of Appeals for respondent.

The facts are not in dispute with the exception of whether the employees regarded the bonus payments as part of their earnings. Some did (R. 23). Some did not (R. 44-49). The important facts are in the stipulation (R. 10-25) and affidavit of Mr. Buckley, the petitioner's general manager (R. 37-43).

The bonus in question is admittedly not an incentive bonus. However, practically all the production employees of defendant regularly received incentive bonuses during the period covered by this action, and all the employees regularly worked overtime hours. Time and one-half was paid on the incentive earnings for the overtime hours. The "prosperity bonus" which is the subject of this action was paid in addition to the two types of incentive

bonuses (R. 24, 38). It began as a Christmas bonus in 1936 (R. 38, 39), when the defendant arbitrarily divided the employees into four groups according to their base hourly rates, and paid differing lump sums to the employees of each group (R. 11).

The same method of payment was used in the Christmas bonuses of 1937 and 1939. In February, 1940, the Company paid a bonus identical to the previous Christmas bonuses. All other bonus payments thereafter employed the same method. The groups were increased from four to fourteen from the April, 1942, bonus to December, 1944, and to thirteen groups from December, 1944, through June, 1945.

The board of directors of defendant acted upon each bonus payment separately at or near the end of the period preceding the bonus payment and only authorized one bonus payment in each period except for one occasion, August, 1941, when the August and October, 1941, payments were authorized (R. 40-41, 11-15). No bonus was ever promised in advance nor was any formula or plan promulgated by which an employee could determine if a bonus would be paid or what the amount would be. Bonus payments were made after the employees had received their wage payments, including incentive earnings and overtime. No employee who quit or was discharged received a bonus or a portion of a bonus. However, employees who were absent sometimes received all or part of the bonus as the management would decide in its discretion. The amount of the bonus or whether any was to be paid was completely discretionary with the defendant's board of directors. Bonus payments did not relate to wages earned, hours worked, years of service, absenteeism, company earnings or profits, efficiency or quality or quantity of production (R. 37-43) (see analyses, R. 59-142, as to lack of relationship to hours worked or wages).

The only relationship the bonus payments have to base hourly rates is that, although paid in flat amounts, bonus payments varied according to the base pay groupings set up by the employer. For example, in 1941 four base pay groupings were used and amounts of $20.00, $25.00, $30.00 and $35.00 were given employees whose base rates fell within these groups. It was an arbitrary method of making larger gifts to one group of employees than another, as one would give his secretary a larger Christmas present than the office boy. As stated, the employees regularly received incentive earnings and worked overtime hours.

List of "Prosperity" Bonuses Paid

1936, 1937, 1939	One paid each year at Christmas time. Four employee groups received different amounts according to basic hourly rate. Qualifying period—Six months employment. $10.00 paid those employed more than three, less than six months.
1940	Two bonuses paid. 8/29 and 12/29 Identical with previous Christmas bonuses.
1941	Six bonuses paid.
	2/27 Identical with previous bonuses
	5/22 Same
	7/2 Same but $100 additional bonus was given to 20 employees, and $75.00 additional bonus given 7 employees.
	8/28 Same, without additional bonuses
	10/23 Same, except additional bonuses of $100 to 19 employees. $75.00 to 7 employees

12/18 Same except additional bonuses of $100.00 to 21 employees and $75.00 to 5 employees.
Also change in qualifying period; one month service—full bonus. Those employed in December received $10.00

1942 Four bonuses paid.

4/2 Fourteen groups, lowest group receiving $30.00 instead of $20.00 as before and increasing to the top group who received $79.00 instead of $35.00.
$100.00 additional to 24 employees
$75.00 additional to 7 employees
Qualifying period; full bonus if employed three months, otherwise none

7/2 Scale increased to run from $40.00 to $100.00
$100.00 additional to 23 employees
$75.00 additional to 7 employees
No change in qualifying period

10/1 Same, except $125.00 additional to 23 employees, and $100 additional to 8 employees

12/17 Same, except $10.00 to employees of less than three months.

1943 Four bonuses paid; 4/1, 7/1, 9/30 and and 12/16, same amounts as in 12/17 except additional bonuses were

4/1 $125.00 to 23 employees
100.00 to 8 employees
7/1 $125.00 to 24 employees
100.00 to 6 employees
9/30 $125.00 to 20 employees
100.00 to 6 employees

12/16 $125.00 to 19 employees
100.00 to 6 employees
10.00 to employees who had not been employed for three months.

1944 Four bonuses.

With the first bonus of this year, March 30th, the Company gave each employee a notice, Exhibit F (R. 35), informing them that the bonus was "in addition to your regular wage" and that "future bonuses, however, are always uncertain * * *"

3/30 Same as 12/16/43 except $125.00 additional to 18 employees and $100 to six employees and no $10.00 bonuses.

6/29 Same except $100.00 to 5 employees

9/28 Same except $125.00 to 17 employees and $100.00 to 5 employees.

12/21 Notice (R. 58) attached with this bonus "this bonus is not to be confused with wages * * *."

Groups were reduced to thirteen, and amounts paid were reduced.

The new scale was from $32.00 to $80.00.

$100.00 additional was given 17 employees

$75.00 additional was given 5 employees

1945 Two bonuses

3/29 Notice similar to March, 1944 notice (R. 35) included with this bonus (R. 23).

Amounts paid were the same as December, 1944, bonus, except qualifying requirement was six weeks employment.

6/28 The last bonus was accompanied by a notice (R. 58) that the bonus "is not to be confused with regular wages * * *."

Otherwise identical with 3/29 bonus except for one month qualifying period.

An examination of instructions for bonus payments (R. 50-54, 168-189, 55-57) shows many arbitrary changes in the lists of employees who were to receive the additional bonuses, as well as the arbitrary selection of employees who should or should not be paid part or all of the other bonus (R. 57, 168, 179).

The total amount of bonuses paid each period changed constantly. Even if the payments in flat amounts and the changes in qualifying periods are eliminated, until March, 1944, when notices as to the nature of the bonus were individually given the employees, the longest period of bonus payments in the same amounts was from July, 1942, to December, 1943, covering only seven payments. The reason for similarity in these amounts and the amounts paid thereafter was the legal restriction on increasing wages, bonuses, or gifts to employees as ordered by the National Stabilization Board (R. 42).

The conclusion of law by the Court of Appeals is based on the stipulated fact that if *some* (italics ours) of the employees were called upon to testify, they would testify that they expected and relied on the employer to pay bonuses in the future (R. 203-204). There is no showing that this is a reasonable expectation. In view of employer's notices that future bonuses were uncertain (R. 35 and 58), the expectation would seem unreasonable. Nor is there any showing what the expectation was. What bonus amounts did he expect to receive? How often would these amounts be paid?

The Court of Appeals decided this case on the authority of its decisions in *Walling v. Richmond Screw Anchor Co.*, 154 Fed. (2d) 780, and *Walling v. Garlock Packing Co.*, 159 Fed. (2d) 44, certiorari denied, 331 U. S. 820. The *Richmond* and *Garlock* cases have the following important elements in common, none of which are present in the principal case:

1. The bonuses in those cases were begun by action of the board of directors in setting up a continuously operating plan of bonus payments to function permanently in the future, until revoked, without further action on their part.

2. Each employee was informed in advance of the bonus system or plan, its method of computation, and that it was to be a continuous plan.

3. The bonuses were computable by formulae. One related to weekly earnings, the other to dividends paid stockholders.

4. Each bonus system contained incentive elements directly related to the betterment of production. In the *Richmond* case, more production meant more bonus. In the *Garlock* case, more production meant more "dividends," and more years of service meant more imaginary shares of stock, more "dividends," and more experienced employees for the employer.

5. New employees were informed of the bonus system when hired.

6. Bonuses were based on forty hours a week. An employee working less than forty hours received proportionately less bonus.

The *Richmond Screw* and *Garlock* cases are approximate cases of implied contract. There is no implication of implied contract in the principal case. The Court in

the *Garlock* decision, p. 46, in distinguishing it from *Walling v. Frank Adam Electric Co.*, 60 F. Supp. 811, which case is almost identical with the principal case, said:

> "the difference is made pointed by a case such as *Walling v. Frank Adam Electric Company*, 60 F. Supp. 811, cited by defendant, where, as the Court found, the directors on a number of occasions and without a promulgated plan declared bonuses for work already performed, and in amounts only then determined. On the Court's finding there it was certainly more justified than we should be here in concluding that the bonuses fell within the Administrator's first category."

The reference to "the Administrator's first category" relates to the Interpretive Bulletin of the Wage and Hour Administrator, dated September 2, 1941, in which the Administrator said:

> "In bonus plans of the first category, the payment and the amount of the bonus are solely in the discretion of the employer. The sum, if any, is determined by him. The employee has no contract right, express or implied, to any amount. This type of bonus is illustrated by the employer who pays his employee a share of the profits of his business or a lump sum at Christmas time without having previously promised, agreed or arranged to pay such bonus. In such case, the employer determines that a bonus is to be paid, and also sets the amount to be paid. Bonus payments of this type will not be considered a part of the regular rate at which an employee is employed, and need not be included in computing his regular hourly rate of pay and overtime compensation."

In the principal case:

1. Payment and amount were in the sole discretion of the employer.

2. Employees had no contract right, express or implied, to any amount of bonus.

3. The bonuses were never promised, agreed to or arranged for in advance.

4. Bonuses were in lump sums.

Admittedly, the Administrator's releases do not have the force of law, yet they do reflect interpretations by an expert in administering the law and are rightfully given some weight in the determinations of the Courts. *Overnight Motor Co. v. Missel,* 316 U. S. 572, 580, note 17.

The findings of fact by the District Court (R. 166-167) are not disputed by the Circuit Court except as to whether or not the petitioner's method of bonus payment constituted an "arrangement" within the meaning of the Administrator's interpretation above. The undisputed findings include: that the bonuses were gratuities; that they did not relate to production or earnings; that they were discretionary, were never promised or announced in advance of payment; were not determinable by a formula and were not part of a bonus plan.

Thus, the principal case is the first case where bonus payments of a clearly gratuitous nature have been held to be part of the "regular rate at which an employee is employed."

The fact that the defendant deducted Social Security, Victory and Withholding Taxes from the bonus payments and included bonus amounts in computing Workmen's Compensation premiums, and included them in income tax deductions, is without significance in determining whether or not they are part of the regular rate at which an employee is hired. Statutory requirements compel the inclusion of bonuses of all types, gifts and pensions. Internal Revenue Code, Reg. 116, Sec. 405.101; Social Security Act Reg. 90, Article 208.

The decision of the Court of Appeals (R. 202) refers to a letter from the company to employees. A reading of the letter (R. 32) will show that the employer clearly distinguishes between wages and "prosperity bonuses." An examination of Exhibit E (R. 33), referred to in said letter, does not show a payroll slip but a statement of all payments made to the employee as a demonstration to the employee of the company's fair treatment. It was not a representation of wages paid and there is no claim that any employee so regarded it.

With reference to the letter to the War Labor Board mentioned by the Court of Appeals at page 201 of the decision, the letter was written to obtain approval of bonus payments, since bonus payments, gratuitous or otherwise were subject to the Stabilization Law. It was not addressed to nor relied upon by any employee. Its reference to cost of living is disputed by the affidavit of Buckley (R. 42-43). There is no finding of fact with regard to this letter.

Reasons for Granting the Writ.

The decision of the Court of Appeals in the principal case is completely in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Walling v. Frank Adam Electric Company,* 163 Fed. (2d) 277. This conflict is recognized by the Circuit Court in the principal case in its decision at page 204, where it said:

> "In *Walling v. Frank Adam Electric Co.,* the Court of Appeals for the Eighth Circuit declined to include bonuses for the purpose of computing the regular rate of pay on the ground that no plan had been promulgated by the company in advance and that the bonuses were all voted at the end of the different periods without obligation for con-

> tinuance. * * * But, as we have already said, we can see no distinction between a 'plan' capable of withdrawal at any time and an arrangement which an employee had every reason to suppose would be continued in absence of some change of circumstances."

In the *Adam* case bonuses were paid quarterly for three and one-half years. Amounts, unlike the principal case, were determined by employee earnings and were ten per cent of straight time earnings for forty hours per week. There was no contract for the bonus, nor arrangement with the employees in advance of payment, nor were they incentive bonuses. The Eighth Circuit concluded such bonuses were not part of the regular rate. In the principal case, the facts were the same, in substance, except that the bonuses in the principal case did not relate to earnings and were not based on forty hours or any other hourly period. *A fortiori,* if the Eighth Circuit is correct, the Second Circuit is wrong.

Further, the decision in the principal case is in apparent conflict with the bases used by the Supreme Court in all relevant decisions as well as in dissenting opinions when they have appeared. The Court and the Justices have emphasized that a contractual relationship between employer and employee should exist for payments to be part of the "regular rate at which he is employed." As stated by Justice Murphy in *Walling v. Youngerman-Reynolds Co.,* 325 U. S. 419 at 425, "the regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the work week exclusive of overtime payments." The same requirement of contract was emphasized in *Walling v. Halliburton Oil Well Cementing Co.,* 331 U. S. 17; *Walling v. Helmerich & Payne,* 323 U. S. 37; *Overnight Motor Co. v. Missel,* 316 U. S. 572; and others.

A clarification of whether Section 7(a) applies to gratuities given over a period is seriously needed. If the Circuit Court is correct in the principal case, thousands of employers have been and are in violation of the act by regularly making gifts of group life insurance premiums, hospitalization benefits, pension donations, as well as Christmas gifts to employees. The criteria of regularity of payment, employee expectation and reliance are all present in these instances. Presently, at least in the Second Circuit, an employer must include all payments, made to or in behalf of an employee, whether wage or gift, as part of the basic forty-hour work week, if such payment is made more than once so as to smack of regularity, or suffer the liabilities of the Act. The Administrator, recognizing that the problem is a vexing one, proposed an amendment to the Act, to the Subcommittee of the House Committee on Education and Labor, on June 11, 1948, which amendment would, among other things, define "regular rate" in such a way as to exclude "sums paid as gifts, * * * the amounts of which are not measured by or dependent on hours worked, production or efficiency" (Wage-Hour Administrator Release of July 27, 1948). However, this proposal was not adopted nor is it part, to the knowledge of the writer, of any current proposed amendment to the Act. Consequently, the general public must rely on judicial interpretation for clarification of the intention of the Legislature.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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INDEX

CITATIONS

Cases:

Statute:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 597

SHEPARD NILES CRANE & HOIST CORPORATION, PETITIONER

v.

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Western District of New York (R. 143-164) is reported at 72 F. Supp. 239. The opinion of the Court of Appeals for the Second Circuit (R. 199-206) is reported at 171 F. 2d 69.

JURISDICTION

The judgment of the United State Court of Appeals for the Second Circuit was entered Decem-

ber 1, 1948 (R. 206). The petition for certiorari was filed on February 25, 1949. Petitioner apparently intended by reference to "Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925" (repealed by c. 646 Sec. 39, 62 Stat. 992, effective September 1, 1948) to invoke the jurisdiction of this Court under Title 28, United States Code, section 1254 (1).

QUESTION PRESENTED

Whether so-called "bonus" payments based on the employees' hourly rates of pay, and paid at regularly recurring intervals over a period of several years "as additional compensation for services rendered," should be regarded as part of the "regular rate" within the meaning of Section 7(a) of the Fair Labor Standards Act.

STATUTE INVOLVED

Section 7(a) of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U.S.C. 201) provides that

> No employer shall * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * *
>
> (3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

This action was instituted in October 1945 by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act to restrain petitioner from violating the overtime and shipment provisions of the Act (R. 2-5). The material facts were stipulated (R. 10-35) and are substantially undisputed. On the basis of the complaint, answer, and stipulation of facts, the Administrator moved for summary judgment (R. 8-9). In addition to the stipulation of facts, the record includes affidavits of six employees and two company officers filed by the employer in opposition to the motion for summary judgment. (R. 37 *ff*).

It was stipulated that the employees who receive the "bonuses" herein discussed are "engaged in the production of goods for commerce and are subject to the provisions of the Fair Labor Standards Act" (R. 11).

During the three and one-half years from the beginning of 1942 until suit was filed in 1945, petitioner made bonus payments at regular three month intervals to its hourly rate employees.[1] These bonus

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[1] The dates were:

April 2, July 2, October 1, and December 17, 1942,
April 1, July 1, September 30, and December 16, 1943,
March 30, June 29, September 28, and December 21, 1944,
March 29, and June 28, 1945.

For the two years 1940 and 1941 the payments averaged one each 3 months (8 for the 24 month period, two in 1940 and six in 1941) (R. 11-21).

payments were in addition to other hourly and incentive earnings of the employees (R. 24). Generally, each followed a resolution of petitioner's board of directors near the end of the bonus period, making provision for payments "as additional compensation for services rendered" (R. 11-15).[2] The bonus payment for each employee has always been calculated from his basic hourly rate of pay. The amount paid individual employees in each basic hourly rate group has remained unchanged since July 1942 except that from and after December 1944 it was reduced twenty percent.[3]

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[2] That the vote of the board of directors was merely a matter of form, and not actually prerequisite to distribution of each installment of the bonus, is illustrated by the fact that such payment was made by the general manager without prior board approval in July 1941. Approval was voted by the board sometime in August. Furthermore, provision for such payment by resolution of the board was not always subsequent to the work for which it was intended as compensation. The October 1941 payment was voted in August of that year, prior to the bonus period, along with the July and August payments. (R. 15, 40-41).

[3] That the bonus was not constantly changing in amount or based on arbitrary classifications of employees (as petitioner's statement may imply) but was stable in nature and calculated from the basic hourly rate, is apparent from the fact that the formula and amounts of individual quarterly bonuses since July 1942 have been as follows (R. 17-21):

Basic hourly rate	Bonus	
	July 1942 to December 1944	Since December 1944
40¢ an hour or less	$ 40.00	$ 32.00
41¢ an hour to 45¢	45.00	36.00
46¢ an hour to 50¢	50.00	40.00
51¢ an hour to 55¢	55.00	44.00
56¢ an hour to 60¢	60.00	48.00
61¢ an hour to 65¢	65.00	52.00
66¢ an hour to 70¢	70.00	56.00

The petitioner always deducted social security taxes from the bonus payments and included them as "Salary and Wages" in its income tax returns, and also included them in computing the premium on the workmen's compensation insurance. Likewise, it included them in victory and withholding tax deductions. (R. 24.)

The petitioner did not, however, include the bonus payments in computing the regular rate of pay under the Fair Labor Standards Act (R. 22).

In August 1943, the petitioner applied to the National War Labor Board, requesting "Approval for *Continuance* of Bonus *Plan*" (R. 26). [Italics supplied.] Although its president and general manager now avers that the bonuses "were not paid to make up cost of living increases" (R. 42), the application to the War Labor Board referred to the increased bonus distribution made on April 2, 1942, as being attributable "principally to the increased cost of living" and stated, "We wish to continue these bonuses at the amounts which were paid on October 1 and December 17 as we do not wish to *decrease the pay* of these employees at the present time" (R. 26). [Italics supplied.] It was intimated in the letter that a diminution or cessa-

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71¢ an hour to 75¢	75.00	60.00
76¢ an hour to 80¢	80.00	64.00
81¢ an hour to 85¢	85.00	68.00
86¢ an hour to 90¢	90.00	72.00
91¢ an hour to 95¢	95.00	76.00
96¢ an hour and above	100.00	80.00

tion of these payments might result in "labor trouble" (R. 27).

Just prior to an election held in December 1943 for the purpose of determining the collective bargaining agent under the National Labor Relations Act, petitioner sent a letter (R. 32-34) to each of its employees, together with a pay-roll slip (R. 34) indicating the total payments from the company to the individual employee during the first nine months of 1943. This total included all the hourly earnings and all bonuses paid to the employee (R. 23, 34). At the same time the employee was also advised of his average weekly earnings, and the company included the bonuses here in question in making that computation (*ibid*).

It was stipulated that "some of the employees" would testify that during the period when the bonus payments were made, "they expected to continue to receive these bonus payments and assumed that they would continue to be made" (R. 23). This expectation of receiving the bonuses and the assumption that they would continue to be paid were predicated on the fact that at recurrent intervals over a substantial period of time the company had made the bonus payments (R. 23). This expectation was uncontradicted, though a possible difference of opinion among the employees on another point seems apparent from the further stipulation in the record that some of them "regarded these bonus payments

as an integral part of the total earnings received for the work performed for the defendant" (R. 23), and the affidavits of six employees filed by petitioner, subsequent to the stipulation, in opposition to the motion for summary judgment, each stating, in identical language that the affiant considered the bonuses "to be gifts from the Company and not part of the regular wages * * *" (R. 44-49). Although the bonus had been paid quarterly or more frequently since August 1940, the bonus payments in 1944 and 1945 were accompanied by a card stating that the bonus was paid "in appreciation of your earnest cooperation and with the desire to reward deserving employees" and that the management hoped it "will be able to pay more prosperity bonuses in the future," but that future bonuses "are always uncertain since they have to depend on profits and other business factors * * *" (R. 23, 35). No such notice was sent with the payments made in the preceding years.

In an affidavit, filed subsequent to the stipulation of facts, in opposition to the motion for summary judgment, defendant's president and general manager stated that the bonuses "were paid as an exercise of arbitrary discretion on the part of the Board which would in each case decide to reward the employees in any amount it felt was reasonable at that particular moment" (R. 41).

The district court denied the Administrator's motion for summary judgment and ordered the

complaint dismissed (R. 165), ruling that the payments were not part of the employees' regular rates of compensation (R. 143-164).

The Court of Appeals reversed (R. 205-206), on the ground that this case was in substance indistinguishable from *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780 (C. A. 2), certiorari denied, 328 U. S. 870, and *Walling* v. *Garlock Packing Co.*, 159 F. 2d 44 (C. A. 2), certiorari denied, 331 U. S. 820, in both of which it had held that payment of bonuses at regularly recurrent intervals constituted part of the "regular rate" under the principles established by this Court's decisions in *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *Walling* v. *Youngerman-Reynolds*, 325 U. S. 419; and *Walling* v. *Helmerich & Payne*, 323 U. S. 37 (see 154 F. 2d at 784, and 159 F. 2d at 45). The fact that a "plan" had been expressly announced to employees in advance in the *Richmond Co.* and *Garlock Co.* cases, said the court, presented "no tenable distinction," inasmuch as in those cases, as in the instant case, the employer reserved the right to deny the "bonus" at any time (R. 203-205):

> * * * in either event the expectation and reliance of the employee would be the same. * * *
>
> * * * * *
>
> * * * we can see no distinction between a "plan" capable of withdrawal at any time and an arrangement which the employee had every

> reason to suppose would be continued in the absence of some change of circumstances. * * *
>
> * * * * *
>
> * * * The expectation of the latter, based upon payment of bonuses at regular intervals, would seem to be no different, particularly where as here the company had notified its employees of the amount of bonus payments made to them during a long period and expressed the hope that "they would be able to pay more prosperity bonuses in the future."

The "crucial fact," as stated by the Second Circuit in its *Richmond* and *Garlock* opinions, on which the instant decision was based (R. 202), is that the bonus payments were regularly made over a substantial period of time. *Richmond* opinion, 154 F. 2d at 784; *Garlock* opinion, 159 F. 2d at 45.

ARGUMENT

The decision below correctly applies the principles now well established by this Court's decisions interpreting the overtime provisions of the Act. Although there is an apparent conflict in result between the decision below and that of the Eighth Circuit in *Walling* v. *Frank Adam Electric Co.*, 163 F. 2d 277, the conflict appears to be simply in the appraisal of evidentiary details rather than over any principle of general importance in the enforcement of the Act. We do not believe that the conflict is of such a character or of sufficient importance to require review by this Court.

1. The decision below is clearly a correct application of principles now well settled by the decisions of this Court interpreting the overtime requirements of the Act. *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *Youngerman-Reynolds*, 325 U. S. 419; *Bay Ridge Operating Co.* v. *Aaron*, 334 U. S. 446. In the *Bay Ridge* case, this Court's most recent opinion on the subject, "regular rate" was defined as "Total compensation for hours worked during any workweek less overtime premium divided by total number of hours worked" (334 U. S. at 450, fn. 3). As there is no contention that the bonus here is an overtime premium, the sole question is whether it constituted "compensation for hours worked." Petitioner's board of directors itself has provided the answer to this question, for all of its resolutions authorizing an installment of the bonus expressly provided that the bonus was "additional compensation for services rendered" (R. 12-21). The earlier decisions of this Court, cited *supra*, also established that compensation to employees in the form of regularly paid bonuses in addition to their regular basic hourly pay is "a normal and regular part of their income" and must be reflected in the regular rate. *Walling* v. *Harnischfeger Corp., supra*, 325 U.S. at 430, 432; *Walling* v. *Helmerich & Payne, supra; Walling* v. *Youngerman-Reynolds, supra.*

Neither the form of the compensation as a wage premium or bonus, nor the manner in which the bonus is computed, alters the decisive fact that it is regularly paid for non-overtime work. Bonus payments made at regularly recurring intervals consistently have been held to constitute a part of the regular rate, whether in the form of a piece work incentive bonus (*Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 431; *Walling* v. *Stone*, 131 F. 2d 461 (C.A. 7)), a profit-sharing bonus (*Walling* v. *Wall Wire Products Co.*, 161 F. 2d 470 (C.A. 6), certiorari denied, 331 U. S. 828), a lump sum addition to base pay (*Carleton Screw Products Co.* v. *Walling*, 126 F. 2d 537 (C.A. 8), certiorari denied, 317 U. S. 634), or a predetermined percentage of base pay (*Walling* v. *Harnischfeger Corp.*, *supra* at 430; *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780 (C.A. 2), certiorari denied, 328 U. S. 870). The decision below, therefore, is in accord with the decisions of this Court, as well as with virtually all of the decisions of the courts of appeals and the interpretation of the Administrator.[4]

2. While the Eighth Circuit in the *Frank Adam Electric Co.* case, reached a different (and we be-

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[4] By quoting only a portion of the Administrator's release, dated September 2, 1941, petitioner gives the impression that the bonuses in the instant case should be excluded from "regular rate" computations under the principles there stated (Pet. pp. 10, 11). The pertinent parts of the release are set forth in full as footnote 3 to the opinion of the Court of

lieve erroneous) result from the decision below, on apparently similar facts, there does not appear to be any difference of opinion between the two courts on the basic controlling principles. As noted above, the differing results reached in these two cases seem to have stemmed from the appraisal of evidentiary details rather than from any conflict with respect to the governing principles or their general application. This is illustrated in the distinction drawn by the court in the *Frank Adam Electric Co.* case between bonuses paid pursuant to a revocable plan expressly announced in advance and similar bonuses where the nature of the employer's obligation, if any, is identical, but the employee's expectation is caused by a history of regular payment instead of an express advance announcement. The court in the *Frank Adam Electric Co.* case, in appraising the evidence, attached significance to the fact that the bonus there was not provided for prior, but only "subsequent to the earning by the employee of any salary upon which it was based" (163 F. 2d at 279). The court below in the instant case on the other hand considered such differences to relate only to details of administration or of draftsmanship, which were outweighed by the similarity of these bonus payments for all practical purposes.

Since the application of the governing principles depends to some extent on the particular facts and

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Appeals and the reason why those principles require the inclusion of this bonus in regular rate computations is presented adequately in that opinion (R. 204-205).

evidence in each case, the different result reached in the two cases has not thus far given rise to any general enforcement problem and it is not anticipated that it will have any substantial general effect. It may be noted that the Administrator did not petition for certiorari in the *Frank Adam Electric Co.* case because of the seemingly limited implications and effect of that decision. It might also be observed that petitions for certiorari were denied in both the *Richmond* and *Garlock* cases, where the decisions were virtually the same as the decision below in the instant case. We do not believe that the situation has been so changed or that the holding below presents any new issue or problem of such importance as to justify the granting of this petition.[5]

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[5] Petitioner's comment (Pet. 14) that review here is needed because the legislative definition of "regular rate" suggested by the Administrator on June 11, 1948 is not part of any current proposed amendment to the Act, is incorrect. The pertinent provisions of that suggested amendment, which appeared in the Administrator's 1948 annual report to the Congress (p. 68), are included verbatim as Sections 7(d)(1) and (3) of H.R. 3190, which has now been reported favorably by the Committee on Education and Labor (81st Cong., 1st sess., H. Rep. No. 267). The proposed amendment would expressly include in the "regular rate" "all remuneration for employment" except for certain specified exclusions.

Contrary to the impression conveyed by the petitioner (Pet. p. 14), the proposed amendment would require the same result reached by the court of appeals here. The words deleted from the portion of the Administrator's proposal quoted by the petitioner, and which qualify the quoted words (Pet. p. 14), are: "payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service." See H. Rep. No. 267, 81st Cong., 1st sess., pp. 5, 47. As the payments here were made *regularly* rather than on *special* occasions, the exclusion from "regular rate" provided by the pro-

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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posed amendment would be inapplicable. The section in the proposed bill which is more pertinent—Section 7(d)(3)(a)—removes any doubt about this. Section 7(d)(3)(a) would exclude "sums paid in recognition of services performed during a given period *if* either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and *not pursuant to any prior* contract, agreement, promise, *arrangement, or a custom or practice causing the employee to expect such payments regularly.*" (Italics added.) See H. Rep. No. 267, 81st Cong., 1st sess., pp. 5, 47. The italicized words make it clear that the payments here involved would not be excluded under this provision. None of the other specified exclusions in the proposed amendments could possibly have any application to such bonus payments as are here involved.

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